

Legislative Council Service

Information Memorandum

DATE: November 6, 2014

TO: Transportation Infrastructure Revenue Subcommittee Members

FROM: Arthur J. Waskey, Contract Staff Attorney

SUBJECT: PROPOSED STATE FINANCIAL SUPPORT FOR AMTRAK'S "SOUTHWEST CHIEF" TRAIN IN LIGHT OF THE ANTI-DONATION CLAUSE

You have requested an information memorandum regarding the constitutional and statutory issues raised by the consideration of New Mexico entering into an agreement with the states of Colorado and Kansas and with Amtrak and BNSF Railway Company (BNSF) to provide funding in response to an Amtrak proposal for continuation of Amtrak's Southwest Chief railroad passenger service along its current route through the three states, including northern New Mexico. The following memorandum is submitted in compliance with that request. Any opinions expressed are those of the author and do not necessarily reflect the opinions of the New Mexico Legislative Council or any other member of its staff. Moreover, any opinion or statement regarding whether a future legislative action would be valid or invalid is not a prediction of what a court might determine, but is the author's conclusion only. This memorandum will provide the background leading to the proposal, a discussion of the Anti-Donation Clause of the Constitution of New Mexico and its application to the proposal, options regarding amendment of that clause and enabling legislation and the type of agreement the state could use in conjunction with the other states to procure the continued operation of the Southwest Chief through northern New Mexico.

Background

On May 12, 1936, the Atchison, Topeka and Santa Fe Railway (ATSF) introduced the Super Chief in a new era of high-speed (for the time) luxury, long-distance passenger trains.¹ The Super Chief, which connected Chicago to Los Angeles through New Mexico in under 40 hours, was often referred to as the "Train of the Stars" because of its popularity with Hollywood celebrities.² The ATSF ran the Super Chief until May 1971, when Amtrak, a federally created corporation, took over long-distance rail passenger service pursuant to the Rail Passenger Service Act of 1970.³ In 1974, the name of the train was changed to the Southwest Limited. A decade later, the name was changed again, to the Southwest Chief, in honor of its illustrious predecessor.⁴ That name continues today.

Currently, as germane to this memorandum, a portion of the Chicago-to-Los Angeles Southwest Chief route passes through Kansas, with stops at Hutchinson, Dodge City and Garden City; Colorado, with stops at Lamar, La Junta and Trinidad; and New Mexico, with stops at Raton, Las Vegas and Lamy in the north and in Albuquerque and Gallup. Amtrak does not own, operate or maintain right of way or track for the Southwest Chief or other long-haul passenger trains, but rather enters into operating agreements that provide it "trackage rights" to operate its passenger trains on track owned primarily by freight rail lines.⁵ A crucial aspect of these operating agreements is that the freight lines cannot profit from Amtrak service but can charge Amtrak the differential or incremental cost of maintaining the right of way and track at higher levels of service required for passenger trains compared to lower levels of service appropriate to

¹The Super Chief, <http://www.american-rails.com/super-chief.html>.

²See <http://www.examiner.com/article/santa-fe-super-chief-1950-s-film-brings-back-the-glory-years>.

³Pub. L. 91-518 (1970) (repealed 1994; current version at 49 U.S.C. §§ 24101, *et seq.* (2008)).

⁴See footnote 1.

⁵New Mexico Department of Transportation [hereinafter "NMDOT"], New Mexico State Rail Plan 2-1 (2014) [hereinafter "State Rail Plan"].

freight trains.⁶ For example, freight trains can move over track rated for 30 miles per hour, while Amtrak requires a service level rated at 79 miles per hour.⁷ In Kansas, Colorado and New Mexico, Amtrak has trackage rights for the Southwest Chief from BNSF.⁸

The State Rail Plan reflects that in fiscal year 2012, there were 129,309 Southwest Chief boardings and alightings along its entire route in New Mexico, and looking just at the Amtrak stops in Raton, Las Vegas and Lamy, the boardings and alightings number 34,534.⁹ And it appears that Amtrak ridership is on the increase in northern New Mexico: from 2008 to 2012, those boardings and alightings increased by almost four percent.¹⁰ But while northern New Mexico has enjoyed the presence of rail travel for well over 130 years,¹¹ its continuation is not guaranteed.

According to a representative of the Colorado Rail Passenger Association,¹² in late 2010 or early 2011, Amtrak officials met with local communities along the Southwest Chief route in Kansas and Colorado, informing them that its trackage rights with BNSF will expire on January 1, 2016 and that BNSF will no longer maintain its track and right of way between those communities for passenger trains. Indeed, BNSF carries little freight along this alignment and in New Mexico none at all on the portion from Lamy to the Colorado border, which portion it would like to sell.¹³ BNSF has offered Amtrak two alternatives for continuation of the Southwest

⁶New Mexico Legislature, Minutes of the Fifth Meeting of the Transportation Infrastructure Revenue Subcommittee 2 (November 12, 2013) [hereinafter "TRANS Minutes"].

⁷*Id.*

⁸The Southwest Chief also operates over a portion of NMDOT-owned track from south of Albuquerque to Lamy. State Rail Plan, at 4-41.

⁹State Rail Plan, at 4-42.

¹⁰*Id.*

¹¹Rail first came to New Mexico at Raton in 1878, and Lamy has had continuous rail service since 1879. See <http://www.lamymuseum.org/lamyhistory.html>.

¹²Author's telephone conversation with Mr. Jim Souby (May 21, 2014).

¹³TRANS Minutes, at 2.

Chief.¹⁴ The first is that Amtrak find a way to pay the full cost of maintaining the alignment from Lamy to Hutchinson, Kansas, for passenger operations at 79 miles per hour. The second is that the Southwest Chief be rerouted to BNSF's Transcontinental route that would take the train on a more southerly route from Belen (then perhaps north and south to and from Albuquerque¹⁵) to Clovis, New Mexico, to Amarillo, Texas, through Oklahoma and then reconnecting to the traditional Southwest Chief route near Wichita, Kansas. Obviously, this second option would end Amtrak's intercity rail passenger service in northern New Mexico, as well as in other communities in Colorado and Kansas.

New Mexico became actively involved with the potential loss of the traditional Southwest Chief route through the north in November 2011, when representatives from Albuquerque and Colfax County attended a meeting organized by the Colorado Rail Passenger Association in La Junta, Colorado.¹⁶ At that meeting, the Southwest Chief Coalition was formed with membership made up of local officials from affected towns and counties in the three states. The mission of the coalition is to make sure all affected communities are informed of the issue and to work toward a solution that will keep the Southwest Chief on its traditional route.¹⁷

In 2012, subsequent to announcing the upcoming expiration of its trackage rights agreement with BNSF, Amtrak made it clear that it desired to keep the Southwest Chief on its traditional route and asked the three states together to finance the improvements to the alignment from Lamy to Hutchinson, Kansas.¹⁸ The estimate of combined cost at the time was at least \$100 million for 10 years to make the necessary passenger rail service level improvements plus an additional combined \$10 million a year for maintenance. In August 2012, the three states

¹⁴State Rail Plan, at 2-43.

¹⁵In 2005, NMDOT negotiated the purchase of BNSF's right of way and track from Belen to Bernalillo (*see* Joint Use Agreement Between New Mexico Department of Transportation and BNSF Railway Company 1, December 5, 2005). This track is maintained for passenger service for the state-owned New Mexico Rail Runner Express commuter train.

¹⁶*See* footnote 13.

¹⁷*Id.*

¹⁸TRANS Minutes, at 2.

informed Amtrak that, at that time, they did not have the money for making the capital improvements or for the annual maintenance.¹⁹ And while the state transportation agencies contacted their respective congressional delegations to urge an increase in Amtrak's federal funding, there has been no sign that federal appropriations to Amtrak would be increased to address the needs of the Southwest Chief.²⁰

New Mexico became more directly involved in possibly contributing to a solution to the Southwest Chief's needs on November 12, 2013, when a representative of Amtrak appeared before the legislature's interim Transportation Infrastructure Revenue Subcommittee (TRANS). Mr. Ray Lang, Amtrak's chief of government affairs, presented a proposal to the subcommittee that would involve the three states, Amtrak and BNSF in resolving the matter.²¹ The proposal is directed by Congress, which has found that greater cooperation is necessary among Amtrak, states and other entities and requires Amtrak to encourage states and others to share the cost of providing rail passenger service.²² Starting with the premise that construction and maintenance needs for the entire alignment from Hutchinson, Kansas, to Lamy, New Mexico,²³ would cost approximately \$200 million over the next 10 years, thereby providing for a 40-year life of the line, the proposal asks for equal participation by each entity. Each would provide \$4 million a year over 10 years, or a total of \$40 million each toward the combined cost. Part of Mr. Lang's

¹⁹Letter, Colorado, Kansas and New Mexico Departments of Transportation to Ray Lang, Director of Governmental Affairs-Midwest for Amtrak (July 20, 2012).

²⁰TRANS Minutes, at 6.

²¹*Id.* at 3.

²²49 U.S.C. §§ 24101(a)(4) and (c)(2) (2008).

²³The segment of the Southwest Chief line from Lamy to Albuquerque is owned by the State of New Mexico through the NMDOT. Amtrak has an operating agreement with the NMDOT on this segment that provides for it to be maintained for passenger service. *See* Agreement Between New Mexico Department of Transportation (NMDOT) and National Railroad Passenger Corporation (AMTRAK) (March 10, 2006). This agreement extends beyond the expiration of Amtrak's operating agreement with BNSF and thus this segment is not part of the proposal at issue. The Rail Runner commuter train also uses part of this segment on its run between Albuquerque and Santa Fe.

presentation included a breakdown of the costs associated with each state.²⁴ For New Mexico, capital costs (replacement and refurbishment of the line) are \$3.8 million over a 10-year period and a 10-year average for maintenance costs of \$6.7 million a year. This appears to be an annual cost of approximately \$7.1 million for the 10 years of the proposal attributable to New Mexico, although in the proposal, due it seems to the participation of Amtrak and BNSF, New Mexico's share would be \$4 million a year. Of course, maintenance costs would continue into the future after the 10-year contribution period. The amount of those future costs and what entity might be responsible for them are unknown.

Mr. Lang also made two observations that reflect the complicated nature of this issue. The first is that all five entities must participate, whether as partners or as individual contributors in a solution to the problem. The second is that if a solution is not achieved and the right of way is not preserved in some manner or is abandoned by BNSF,²⁵ it will be extremely difficult to ever get the line back for the Southwest Chief.²⁶

In addition to the presentation by Mr. Lang, Mr. Bill Sauble, a Colfax County commissioner and co-chair of the Southwest Chief Coalition, presented the coalition's position to the TRANS and requested that New Mexico conduct a study regarding preservation of the Southwest Chief, collaborate with the New Mexico congressional delegation to procure maintenance funding, commit the money requested by Amtrak and dedicate a permanent source of maintenance funding.²⁷ TRANS itself laid the groundwork for this memorandum by discussing how the Anti-Donation Clause, Article 9, Section 14 of the Constitution of New Mexico, might apply to Amtrak's request and, if it does, what amendments would be needed to avoid the clause's proscription against public finance of certain private interests.²⁸

²⁴TRANS Minutes, at 8 and handout Southwest Chief Routing (by Ray Lang, November 11, 2013). The minutes reflect that capital costs are \$3.9 million per year for 10 years, but in an email to the author dated May 29, 2014, Mr. Lang indicated that figure is a one-time cost for the 10-year period.

²⁵TRANS Minutes, at 3.

²⁶*Id.* at 4 and 5.

²⁷*Id.* at 4.

²⁸*Id.* at 7.

In the past two legislative sessions, the legislature has responded to the potential loss of the Southwest Chief. In the 2013 regular session, Senate Memorial 3, sponsored by Senator Peter Wirth, and House Memorial 2, sponsored by Representative Brian Egolf, Jr., were adopted, "RECOGNIZING THE IMPORTANCE OF AMTRAK . . . AND ITS CONTRIBUTION TO NEW MEXICO'S ECONOMY; ACKNOWLEDGING THE THREAT TO VIABILITY OF THE SOUTHWEST CHIEF TRAIN"; and calling for state and federal support. These memorials, in addition, recite that Colfax County, Mora County, San Miguel County, Santa Fe County, the City of Albuquerque, the City of Las Vegas, the City of Raton, the City of Santa Fe, the Town of Wagon Mound and the New Mexico Municipal League have adopted resolutions to support the continuation of the Southwest Chief in northern New Mexico. Also, in the 2013 regular session, House Memorial 50, introduced by Representative Sheryl Williams Stapleton, was adopted. It requested the Economic Development Department "to conduct a market analysis to examine the potential economic and job creation benefits of the state purchasing the railroad tracks from Raton pass to Anthony".

In the 2014 regular session, Senate Bills 168 and 221 (Senator Pete Campos) and House Bills 116 and 241 (Representative Roberto "Bobby" J. Gonzales) were introduced but not adopted for appropriating money from the general fund or severance tax bonds to fund Amtrak's proposal, subject to commitments from Colorado and Kansas and a binding agreement with Amtrak. Also in 2014, a special appropriation was made to fund this information memorandum.²⁹

Since the beginning of this year, the other potential parties to an agreement for preservation of the Southwest Chief have moved forward to seek funding. Several communities in western Kansas and eastern Colorado, the Kansas Department of Transportation, Amtrak and BNSF combined to pledge \$9.3 million in matching funds to apply for federal Transportation Investment Generating Economic Recovery grants (the so-called TIGER grants) from the United States Department of Transportation to support the continuation of the Southwest Chief through those communities. On September 9, 2014, they were awarded \$12.5 million in grants for that

²⁹General Appropriation Act of 2014, § 5, ¶ 2.

purpose.³⁰ As a result, Amtrak has apparently committed to continue service in those communities for two more decades,³¹ even though no information is available about where future funding will come from. But, those grants and promise do not resolve the issue for southern Colorado or northern New Mexico, because the Southwest Chief could still be routed east from Belen, New Mexico, to Amarillo, Texas, and then to eastern Colorado.³² It is even possible that Albuquerque could be bypassed in this scenario.³³ Colorado has adopted legislation to identify a funding stream for its share of keeping the Southwest Chief on its traditional route and, among other things, in an endorsement of the value of the Southwest Chief to that state, to add a new stop at Pueblo, Colorado, that would add \$31 million to Colorado's share of preserving the traditional route of the Southwest Chief. The law also conditions Colorado support on commitments from Kansas and New Mexico.³⁴

Legal Issues

Amtrak's proposal, as directed by Congress, is to help it to continue to provide a transportation service to northern New Mexico that it does not otherwise have to provide. The proposal is not to improve BNSF's right of way with an incidental benefit to Amtrak but rather the other way around. As will be discussed later in this memorandum, if the state decides to procure the continued services of the Southwest Chief from Amtrak, an incidental benefit to BNSF is not invalid. In contemplating the Amtrak proposal and, as the TRANS noted at its November 2013 meeting,³⁵ the primary legal concern to be addressed is New Mexico's Anti-

³⁰Patrick Malone, *Chief gains funding ground, but route in N.M. uncertain*, The Santa Fe New Mexican, September 10, 2014, at A-1.

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴House Bill 14-1161, State of Colorado, Sixty-Ninth General Assembly, Second Regular Session.

³⁵TRANS Minutes, at 8.

Donation Clause.³⁶ While the historical origins of the clause are wrapped in American westward expansion in the late nineteenth and early twentieth centuries and are related to rail, it is not the purpose of this memorandum to explore that history or to expound on its propriety.³⁷ Suffice it to say that the clause merits respect for the due consideration it causes whenever the public's money is sought to further a possible private interest, even if that interest serves a public desire.

Here, the language of the clause and its exceptions will be reviewed and its practical application as reflected in New Mexico court cases and existing law discussed, and then the principles learned will be applied to the Amtrak request. The primary paragraph of the Anti-Donation Clause reads:

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through G of this section.

Preliminarily, there are two things to note. The first is that this language contains two references to exceptions; what may be referred to as the external exceptions — "as otherwise provided in this constitution" and what may be referred to as the internal exceptions — "Subsections A through G of this section". To the extent they have any bearing on the Amtrak proposal, they will be discussed later in this memorandum.

The second thing to note is the specific reference to "private enterprise for the construction of any railroad", which is clearly apropos. It will be helpful to discuss this phrase now and in some detail in order to understand something about the intent of the Anti-Donation Clause, Amtrak's unique status and the nature of the services it provides. This discussion in turn will be relevant to the continued analysis of the general principles of the clause later in this memorandum. Although the Anti-Donation Clause is often regarded as a unitary prohibition against public aid to private enterprise in general, the New Mexico Supreme Court in the case of

³⁶N.M. Const. art. IX, § 14.

³⁷See Alan Hall, Understanding the Anti-Donation Clause: A Historical Perspective (March 20, 2006).

*Village of Deming v. Hosdreg Co.*³⁸ has suggested that it actually contains two separate proscriptions: one disallowing the state to "directly or indirectly lend or pledge its credit or make any donation to or in aid of any . . . public or private corporation", what will be referred to herein as the "general phrase"; and the other proscription disallowing the state to "directly or indirectly lend or pledge its credit or make any donation to or in aid of any . . . private enterprise for the construction of any railroad",³⁹ what will be referred to herein as the "railroad phrase". In *Hosdreg*, the court was faced with a challenge to a law similar to the Industrial Revenue Bond Act⁴⁰ that allows a municipality to issue revenue bonds to acquire projects that could be sold or leased to private concerns, creating a revenue stream to repay the bonds. The challengers claimed, among other things, that the law violated the Anti-Donation Clause by "giving of aid to private enterprise".⁴¹ The court held that what the challengers really meant was providing a "donation to or in aid of any private corporation",⁴² since the Anti-Donation Clause nowhere proscribes "the giving of aid to private enterprise"⁴³ absent a donation for the construction of a railroad, further suggesting that the two quoted phrases are not "always or, necessarily, synonymous".⁴⁴

The general phrase "lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation" is broad enough to encompass lending or pledging credit or donating money to private enterprise for railroad construction.⁴⁵ But the

³⁸*Village of Deming v. Hosdreg Co.*, 1956-NMSA-111, 62 N.M. 18, 303 P.2d 929.

³⁹*Id.* ¶¶ 31-32.

⁴⁰NMSA 1978, §§ 3-32-1 through 16.

⁴¹*Hosdreg*, 1956-NMSA-111, ¶ 30.

⁴²*Id.* ¶ 33.

⁴³*Id.*

⁴⁴*Id.* ¶ 34.

⁴⁵The normal meaning of "person" is a human being, Black's Law Dictionary 1178 (8th ed. 2004), but in New Mexico statutes it means "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or any legal or commercial entity", NMSA 1978, § 12-2A-3(E). An "association" is normally "a gathering of people for a common purpose", Black's, at 132. A "public corporation" is

framers of the Constitution of New Mexico specifically distinguished construction of a railroad by private enterprise from the broader prohibition. The railroad phrase is so specific and the terminology so unlike the general phrase that it cannot be just another iteration of the general proscription. The use of the connector "or" between the two phrases is telling because the normal meaning of "or" is disjunctive,⁴⁶ distinguishing between two different options, such as "the state shall not do this or shall not do that". Is the language of the railroad phrase in addition to or an alternative to the general phrase? Unfortunately, there are no court cases addressing the meaning of the railroad phrase. Therefore, it is necessary to analyze it in more detail and apply principles of statutory construction to determine what the framers intended when the general and railroad phrases of the Anti-Donation Clause were adopted.⁴⁷

Looking at the railroad phrase, on its face the words are unambiguous, that is, in context, they are not reasonably susceptible to two or more different meanings. The operative terms or words, "private enterprise", "construction" and "railroad", should be given their plain, dictionary meanings.⁴⁸ The term "private enterprise" has the same meaning as "free enterprise", which is "[a]n economic and political doctrine holding that a capitalist economy can regulate itself in a freely competitive market through the relationship of supply and demand with a minimum of governmental intervention and regulation",⁴⁹ or "[a] private and consensual system of production and distribution, usually conducted for a profit in a competitive environment that is relatively free of government interference".⁵⁰ The concept that "free enterprise" and "private enterprise" are

either "a corporation whose shares are traded to and among the general public" or "a corporation that is created by the state as an agency in the administration of civil government", Black's, at 367, while a "private corporation" is "a corporation founded by and composed of private individuals principally for a nonpublic purpose, such as . . . railroad corporations . . .". *Id.*

⁴⁶*Diamond v. Diamond*, 2012-NMSC-022, ¶ 27, 283 P.3d 260 (the word "or" should be given its normal disjunctive meaning unless the context of a statute demands otherwise).

⁴⁷*Postal Fin. Co. v. Sisneros*, 1973-NMSC-029, ¶ 8, 84 N.M. 724, 507 P.2d 785 (rules of statutory construction apply to the constitution).

⁴⁸*N.M. Att'y. Gen. v. N.M. Pub. Regulation Comm'n.*, 2013-NMSC-042, ¶ 26, 309 P.3d 89 (courts may use the dictionary to find words' plain meaning in order to interpret the intended meaning of statutory language).

⁴⁹The Random House Dictionary of the English Language, 2nd ed., Unabridged 1540, 763 (1987).

⁵⁰Black's Law Dictionary 690 (8th ed. 2004).

synonymous is reflected in New Mexico law where the provision setting the hours for the Corrections Department's enterprises' working day uses a "free enterprise working day" as a standard rather than using "private" in contrast to a public (corrections) enterprise.⁵¹ "Construction" means "[t]he act of building by combining or arranging parts or elements",⁵² which is consistent with how the word is used in New Mexico statutes. For example, in the Regional Transit District Act⁵³ under which the Rail Runner commuter train operates, "construction" includes "the planning, designing, engineering, acquisition, installation, construction or reconstruction of a regional transit system".⁵⁴ "Railroad" means "[a] permanent road laid with rails, commonly in one or more pairs of continuous lines forming a track or tracks, on which locomotives and cars are run for the transportation of passengers, freight, and mail".⁵⁵ Again, this is consistent with the statutory definition in the Motor Vehicle Code⁵⁶ that defines "railroad" as "a carrier of persons or property upon cars operated upon stationary rails".⁵⁷

Standing alone then, the clear and unambiguous words in the railroad phrase reveal that a pledge of credit or donation for railroad construction to an enterprise that is not private would be constitutional.⁵⁸ This language, however, must also be read in the context of the entire Anti-Donation Clause so that both the general and railroad phrases can be considered in relation to one another in order to determine the framers' intent.⁵⁹ Unless the railroad phrase is intended as a

⁵¹NMSA 1978, § 33-8-9.

⁵²Black's, at 332.

⁵³NMSA 1978, §§ 73-25-1 through 19.

⁵⁴NMSA 1978, § 73-25-3(E).

⁵⁵The Random House Dictionary of the English Language, 2nd ed., Unabridged 1595 (1987).

⁵⁶NMSA 1978, Chapter 66, Articles 1 through 8.

⁵⁷NMSA 1978, § 66-1-4.15(A).

⁵⁸*Diamond*, 2012-NMSC-022, ¶ 25 ("Where the language of a statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." (internal quotation marks and citation omitted)).

⁵⁹*Id.* ("When interpreting a statute, all sections of the statute must be read together so that all parts are given effect." (internal quotation marks and citation omitted)).

separate prohibition or an exception to the general prohibition, it would appear to be surplusage or meaningless, since the language of the general phrase otherwise is broad enough to include the prohibition in the railroad phrase, as previously noted. But that should not be the case, because in order to determine the framers' intent behind constitutional provisions, the provisions must be reconciled with one another.⁶⁰ Statutes must be construed so that no part becomes surplusage, superfluous or meaningless.⁶¹

Indeed, giving effect to the framers' intent is the primary responsibility in determining the meaning of a constitutional provision.⁶² And intent, in the first instance, is derived from the plain meaning of the words used "unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions".⁶³ Here, among those possible problems, there is no detectable double meaning in the words used or mistake in wording, and the general and railroad phrases each can stand on its own without being at variance with reason and creating an absurdity. One may discern a conflict between the general and the railroad phrases because if credit or a donation is given or made to an enterprise that is not private in nature for the construction of a railroad and therefore not prohibited by the railroad phrase, the credit or donation would still seem to violate the general phrase by providing the credit or donation to any person, association or public or private corporation. But that conflict, if it exists, can be resolved, effect given to both phrases and no language rendered meaningless if the two are seen as different proscriptions, as suggested by the court in *Hosdreg*, or the railroad phrase, dealing with a limited factual situation, is seen as an exception to the broadly stated general phrase. The two phrases then are

⁶⁰*Gardiner v. Galles Chevrolet Co.*, 2007-NMSC-052, ¶ 10, 142 N.M. 544, 168 P.3d 116 (the meaning of parts of a statute must be reconciled with each other).

⁶¹*Regents of the Univ. Of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236 ("no part of the statute is rendered surplusage or superfluous"); *N.M. Atty. Gen. v. N.M. Pub. Regulation Comm'n.*, 2013-NMSC-042, ¶ 27, 309 P.3d 89 ("We do not interpret our statutes so as to deprive them of their intended meaning.").

⁶²*Moongate Water Company, Inc. v. City of Las Cruces*, 2013-NMSC-018, ¶ 6, 302 P.3d 405 ("When this Court construes statutes, our charge is to determine and give effect to the Legislature's intent.").

⁶³*City of Albuquerque v. Montoya*, 2012-NMSC-007, ¶ 12, 274 P.3d 108.

"consistent, harmonious and sensible", which is the goal in statutory construction.⁶⁴ Statutory construction thus supports a conclusion that the railroad phrase has separate meaning from the general phrase and, therefore, that a loan or pledge of credit or a donation for the construction of a railroad to an entity that is not private or free enterprise is constitutionally permitted.

The relevance of this point is that Amtrak does not represent private or free enterprise in the commonly understood meaning given above. Rather, Amtrak, also known as the National Railroad Passenger Corporation, is a federally chartered corporation, created by Congress in 1970 to take over passenger rail service previously operated by private railroad companies in the interest of public convenience and necessity.⁶⁵ In finding that Amtrak was "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution", the United States Supreme Court in *Lebron v. National Railroad Passenger Corporation*⁶⁶ said: "That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is . . .".⁶⁷ Unlike private enterprise, Amtrak "is established and organized under federal law for the very purpose of pursuing federal government objectives, under the direction and control of federal appointees".⁶⁸ Amtrak's mission and detailed goals, such as on-time performance and average speed, are mandated by Congress.⁶⁹ Its board of directors includes the secretary of the U.S. Department of Transportation, the president of Amtrak and seven additional members appointed by the president and confirmed by the United States Senate.⁷⁰ The responsibility of the board is not to operate Amtrak at a profit for the benefit of shareholders as in a private corporation but to

⁶⁴*State ex Rel. Clinton Realty Co. v. Scarborough*, 1967-NMSC-152, ¶ 9, 78 N.M. 132, 429 P.2d 330 (S. Ct. 1967).

⁶⁵October 30, 1970, Pub. L. 91-518 (current version at 49 U.S.C. § 24101 *et seq.*, as amended (1994)).

⁶⁶513 U.S. 374, 394, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995).

⁶⁷*Id.* at 393 (internal quotation marks and citation omitted).

⁶⁸*Id.* at 398.

⁶⁹49 U.S.C. § 24101(c) (1994).

⁷⁰49 U.S.C. § 24302(a) (2008).

meet the public interest goals set by Congress.⁷¹ In addition, unlike private enterprise, Amtrak is subject to generally accepted government auditing standards issued by the Comptroller General of the United States,⁷² to audit reports of the U.S. Department of Transportation's Office of Inspector General⁷³ and to the federal Freedom of Information Act.⁷⁴ As a final point, it is well-known that Amtrak receives substantial subsidies from the federal government for both capital and operational expenses. As an example, the U.S. House Appropriations Committee in May 2014 released its fiscal year 2015 transportation funding bill that proposes \$340 million for Amtrak operations and \$850 million for capital grants.⁷⁵

Based on this analysis of Amtrak's status and the above analysis of the railroad phrase, it is possible to conclude that Amtrak is not "private enterprise" in the sense that it is used in the Anti-Donation Clause, but is more like a federal government entity. If that is the case, the clause may not apply at all to a New Mexico/Amtrak relationship. To the extent the Amtrak proposal includes construction or reconstruction of railroad infrastructure in order to meet its required service level for passenger rail, the plain meaning of the words in the railroad phrase indicates that the state could lend its credit or donate aid in response to Amtrak's proposal. But rationally, New Mexico is not going to provide financial support to Amtrak without receiving value in return. Although, as pointed out earlier, the railroad phrase of the Anti-Donation Clause has not been the subject of any substantive consideration since statehood, the general phrase and the concepts of debt and donation entrenched in the clause have been the subject of numerous court

⁷¹*Lebron*, 513 U.S. at 399 (contrasting the responsibilities of Amtrak's board of directors with those of another federally created corporation).

⁷²Memorandum from Ted Alves, Amtrak Inspector General on Monitoring the Work of Amtrak's Independent Public Account, to Jeffrey R. Moreland, Chairman, Audit and Finance Committee, Amtrak Board of Directors (April 18, 2013).

⁷³*See, e.g.*, Office of Inspector General, U.S. D.O.T., Audit Report No. CR-2013-056, Amtrak's New Cost Accounting System Is A Significant Improvement But Concerns Over Precision and Long Term Viability Remain (March 27, 2013).

⁷⁴5 U.S.C. § 552 (2002); 49 U.S.C. § 24301(e) (2004).

⁷⁵U.S. House of Rep., Appropriations Committee Press Release, Appropriations Committee Releases the Fiscal Year 2015 Transportation, Housing and Urban Development Bill (May 6, 2014), *available at* <http://appropriations.house.gov/news/documentsingle.aspx?DocumentID=379006>.

decisions and attorney general opinions. Their teaching, especially in light of Amtrak's status and purpose, reveals that an appropriate form of financial support subject to a bargained-for agreement with Amtrak should pass muster even when viewed against the general restrictions of the clause.

Debt

The first restrictive terminology from the Anti-Donation Clause to be assessed here is "the state . . . [shall not] lend or pledge its credit . . . to any person . . .". In New Mexico, at the state level, it might be said that there are two forms of debt that a pledge of credit can create: debt in the constitutional sense, subject to the constitutional limitations and prohibitions on debt creation and amounts of debt, and debt arising under the "special fund" doctrine, which is not subject to those constitutional limitations. Constitutional debt is a "debt pledging for its repayment the general faith and credit of the state . . . and contemplating the levy of a general property tax as the source of funds with which to retire the same".⁷⁶ Conversely then, in order for "an obligation to come under the special fund doctrine, the creation of the obligation and the law authorizing it must specify and set out the sources for payment thereof and thereby disclose that no part of the payment is to be obtained from general taxation".⁷⁷ "[R]evenue bonds or other state or municipal obligations which do not engage the general taxing power of the state . . . are not within the prohibition of Const. Art. IX, §§ 12 and 13, either as to the requirement for approval of a popular referendum, or as exceeding constitutional limitation on [municipal] indebtedness."⁷⁸ This statement also applies to state debt restrictions in Article 9, Section 8 of the Constitution of New Mexico⁷⁹ and the debt created by a "loan or pledge of credit" in the Anti-

⁷⁶*State ex rel. Capitol Addition Bldg. Comm'n v. Connelly*, 1935-NMSC-045, ¶ 23, 39 N.M. 312, 46 P.2d 1097; *in accord*, *State v. City of Hobbs*, 1950-NMSC-032, ¶ 5, 54 N.M. 237, 220 P.2d 704.

⁷⁷*State Office Building Commission v. Trujillo*, 1941-NMSC-051, ¶ 25, 46 N.M. 29, 46, 120 P.2d 434, 444 (1941).

⁷⁸*Hosdreg*, 1956-NMSC-111, ¶ 28.

⁷⁹*Connelly*, 1935-NMSC-045, ¶ 23 ("debt" as used in Art. 9, § 8 is used in the same sense as in Art. 9, § 12).

Donation Clause, Article 9, Section 14.⁸⁰ Therefore, if the legislature decides to procure passenger rail services from Amtrak, in whatever manner the parties may ultimately agree, the money may be raised by issuing bonds that pledge revenues from a special fund — revenue bonds, gross receipts tax bonds and severance tax bonds, for example.⁸¹ But a financing plan could not be based on a tax imposed on Amtrak since Congress has exempted it from state taxation.⁸² Of course, general fund money would not raise an issue of lending or pledging credit.

Donation

The second restriction in the Anti-Donation Clause to be reviewed is "the state ... [shall not] ... make any donation to or in aid of any person . . .". The word "donation" is used "in its ordinary sense and meaning, as a 'gift', an allocation or appropriation of something of value, without consideration",⁸³ "a gratuitous transfer of property from one to another".⁸⁴ Thus, our courts have found an unconstitutional donation when a county was authorized to pay money to a private corporation formed to celebrate the fourth centennial of Coronado's exploration of New Mexico, relieving the corporation of its obligation to construct an auditorium,⁸⁵ when the state appropriated money to subsidize the livestock industry in the purchase of feed during a time of drought⁸⁶ and when the state attempted to provide a tax credit to liquor licensees against current taxes owed when the Liquor Control Act was reformed in the 1980s.⁸⁷ In these cases, the fact

⁸⁰*Kennecott Copper Corp. v. Town of Hurley*, 1973-NMCA-032, ¶ 1, 84 N.M. 743, 507 P.2d 1074 (industrial revenue bond financing does not violate Art. 9, § 14).

⁸¹There may be limitations on the use of some bond proceeds. That issue is not within the scope of this memorandum.

⁸²49 U.S.C. § 24301(l) (2004).

⁸³*Hosdreg*, 1956-NMSC-111, ¶ 36.

⁸⁴*Id.* at ¶ 35 (internal quotation marks and citation omitted).

⁸⁵*Hutcheson v. Atherton*, 1940-NMSC-001, ¶ 34, 44 N.M. 144, 99 P.2d 462.

⁸⁶*State ex rel. Mechem v. Hannah*, 1957-NMSC-065, ¶ 40, 63 N.M. 110, 314 P.2d 714.

⁸⁷*Chronis v. State ex rel. Rodriguez*, 1983-NMSC-081, ¶ 30, 100 N.M. 342, 670 P.2d 953.

that the donation provided an incidental benefit to the governmental entity providing the donation,⁸⁸ helped serve a "highly commendable public purpose"⁸⁹ or "benefit[ed] the economy of the state"⁹⁰ did not relieve it of its unconstitutional character. However, when the state receives "present value" for its appropriation, even though that value may diminish, and the ability to better perform a governmental function;⁹¹ real or actual benefits or a "quid pro quo in advantages";⁹² the fulfillment of a legal obligation;⁹³ or a direct benefit to an agency,⁹⁴ the appropriation is freed from a claim of unconstitutionality.

In addition, the New Mexico Supreme Court has found that if a benefit to private industry results from a scheme involving revenue bonds from a publicly owned project, not only is a debt in the constitutional sense not created, but the benefit does not amount to a donation. In *Hosdreg*, after determining that industrial revenue bonds do not create an impermissible debt, the court asked: "Does the giving of aid to private enterprise, here shown, amount to the making of a donation to a private corporation within the prohibition of Const. Art. IX, Section 14? A careful reading of the constitutional provision invoked in this challenge seems convincing that it does not."⁹⁵

⁸⁸*Hutcheson*, 1940-NMSC-001, ¶ 37.

⁸⁹*Hannah*, 1957-NMSC-065, ¶ 37.

⁹⁰*Id.* at ¶ 39.

⁹¹*See State ex rel. State Eng'r v. Lewis*, 2007-NMCA-008, ¶ 50, 141 N.M. 1, 150 P.3d 375 (state purchase of water rights in order to avoid priority administration that relieves junior rights holders of financial hardship does not violate the Anti-Donation Clause because the state receives present value for its purchase even though future priority calls may diminish that value. In addition, the state receives valuable consideration in being able to better meet its water delivery obligation to Texas.).

⁹²*Hutcheson*, 1940-NMSC-001, ¶ 26.

⁹³AG Op. No. 76-06 (1976) (vouchers for special education at private institutions when public school programs do not meet students' needs do not violate the Anti-Donation Clause because the state has a legal obligation to provide an education).

⁹⁴AG Op. No. 81-05 (1981) (reimbursement for travel expenses to Santa Fe to prospective employees is convenient for the state highway department and therefore constitutes public benefit consideration that is not an unconstitutional donation).

⁹⁵*Hosdreg*, 1956-NMSC-111, ¶¶ 29 and 30; *in accord Kennebec Copper Corp. v. Town of Hurley*, 1973-NMSC-032, ¶ 1, 84 N.M. 743, 507 P.2d 1074.

Consideration

So far, the discussion identifying general principles for analysis of the donation aspect of the Anti-Donation Clause provides some general guidance regarding support to Amtrak, ignoring now for the purpose of discussion the possibility earlier noted that Amtrak is not private enterprise and thus not subject to the Anti-Donation Clause: in order for New Mexico to validly provide financial support to Amtrak in order to retain the Southwest Chief in the north, the state needs to receive consideration, something of commensurate value in return. Such consideration would be part of a bargained-for exchange established in a written agreement, such as contemplated in House Bill 241 from the 2014 regular session.⁹⁶

What type of consideration would correspond or be proportionate to the financial support Amtrak has requested? Or, stated differently, is continuation of the Southwest Chief on its present route through northern New Mexico sufficient consideration to support a bargained-for exchange that does not leave state support as a mere donation? From the discussion here, it should be a value that addresses government service or affects the accomplishment of a governmental function, helps the state meet a legal obligation, is a direct benefit to an agency or provides real advantages to the state. A recognition of the validity of this type of governmental function consideration in Anti-Donation Clause analysis is found in a 1997 opinion of the attorney general.⁹⁷ There, the attorney general determined that because education was a "well recognized" government function, Albuquerque Technical-Vocational Institute (now Central New Mexico Community College) could, consistent with the Anti-Donation Clause, make scholarship awards with state money "because . . . the resulting benefit to students consists of a recognized governmental service, *i.e.*, education".⁹⁸ The attorney general based this ruling on the

⁹⁶Certainly, the state, if it is possible and within policy decisions, could remove the matter from anti-donation concerns altogether by purchasing the BNSF line from Lamy to the Colorado border, upon which the Southwest Chief is dependent in northern New Mexico; entering into an operating agreement with Amtrak, which the state has already done on the line from Albuquerque to Lamy; and then identifying a funding mechanism for capital improvements and maintenance responsibilities. The Anti-Donation Clause would not be implicated because money spent on the line would be for the state's own benefit in maintaining a public asset and the relationship with Amtrak would be by contract.

⁹⁷AG Op. No. 97-02 (1997).

⁹⁸*Id.* at 6.

understanding that "the [anti-donation] clause was intended to prevent the investment of public funds in private enterprises. It was not intended to affect governmental services to the public or the accomplishment of governmental functions . . .".⁹⁹

A parallel situation to the scholarship awards exists between the state and Amtrak. As with education, in New Mexico and elsewhere transportation is a well-recognized and established governmental function.¹⁰⁰ Indeed, the New Mexico Legislature has indicated that "[t]he construction, operation and maintenance of a transportation project by the state transportation commission shall constitute the performance of an essential governmental function".¹⁰¹ Furthermore, in direct support of passenger rail transportation, the legislature adopted the Railroad Planning and Projects Act.¹⁰² The intent of that act is to give the NMDOT "the functions of planning necessary to develop a coordinated program with the United States Department of Transportation in the fields of rail freight and passenger transportation. In order to accomplish this purpose and to obtain all possible funds available to implement this activity, the Railroad Planning and Projects Act shall be liberally construed."¹⁰³ Further, the act gives the NMDOT "the authority to plan and promote efficient rail transportation services" and directs it to "take all practical steps to improve the quality of rail freight and passenger services in New Mexico".¹⁰⁴ This is the foundation upon which the legislature could, if it chooses, act to participate with Amtrak and the other involved parties to preserve interstate, intercity, long-distance rail passenger service in northern New Mexico. It seems a reasonable conclusion could be drawn that an Amtrak obligation to maintain Southwest Chief passenger service through the north in return for New Mexico financial support would be fulfilling or helping the state to better

⁹⁹*Id.* at 3.

¹⁰⁰*See, e.g.,* Texas Transportation Code § 454.002 (mass transportation service provided by a municipality directly or through another entity by lease, contract or other manner is an essential governmental function).

¹⁰¹NMSA 1978, § 67-3-76. For most purposes in New Mexico statutes, references to the state transportation commission are meant as references to NMDOT. *See* NMSA 1978, § 67-3-7.

¹⁰²NMSA 1978, §§ 63-3A-1 through 3.

¹⁰³*Id.* at § 63-3A-2.

¹⁰⁴*Id.* at § 63-3A-3(B)(2).

perform an essential governmental function, effectuate the Railroad Planning and Projects Act, assist in the development of a coordinated program of passenger rail service with the federal government and be of direct benefit to the NMDOT in planning, improving and promoting rail passenger transportation. This result would appear to constitute sufficient consideration to prevent the state's financial participation from being viewed as a mere donation.

In using the fulfillment of governmental functions as the basis for consideration in an agreement with Amtrak, the legislature would seemingly be on firm ground. What are important governmental functions are matters of policy for the legislature to determine, unless the policy itself is unconstitutional, and the courts generally will not invalidate the legislature's determination. In *Hosdreg*, a portion of the court's final comments in upholding an industrial revenue bond program against an Anti-Donation Clause attack are worth noting:

Any movement reasonably calculated to improve the economic welfare of the people as a whole through furnishing employment, promoting industry and trade, and inspiring new hope, seems well worthwhile . . . if the overall picture shows a comfortable balance of advantages over disadvantages to many, none can doubt that the measure authorizing it has justified its enactment. After all, the question is one of policy and, within constitutional bounds, that is for the legislature. Even though we may question the wisdom of a given enactment, as a matter of policy, that gives us no right to strike it down, if it violates no provision of the fundamental law.¹⁰⁵

At this point, it should be recognized that BNSF may incidentally benefit from any agreement between the state and Amtrak, since BNSF owns the right of way, track and facilities between the Colorado border and Lamy that require improvement. But, as has been discussed, BNSF no longer uses that line, has attempted to sell it to the state in the past and there is the possibility the right of way could be abandoned. Amtrak's proposal, of course, is for its needs to maintain passenger service on that line. The "dominating motive" of an agreement between the state and Amtrak for financial support will be to provide the governmental function of transportation. In such a case, even though there may be an incidental benefit to BNSF, the Anti-

¹⁰⁵*Hosdreg*, 1956-NMSC-11, ¶¶ 56, 57.

Donation Clause is not violated.¹⁰⁶ Moreover, that incidental benefit will occur in a separate operating agreement between Amtrak and BNSF and redounds to the state's benefit as physically providing the means for Amtrak to continue the current route of the Southwest Chief.

If the intent of the Anti-Donation Clause is to prevent the entanglement of public money with private interests, that will not be the case here. Rather, Amtrak's proposal and New Mexico's support through the NMDOT will constitute one entity fulfilling its governmental function by cooperating with another entity fulfilling its governmental function. In fact, as noted previously, Amtrak and the NMDOT are already cooperating to provide intercity rail passenger service to northern New Mexico. After purchasing right of way from BNSF in 2005 for the Rail Runner, the NMDOT entered into a binding agreement with Amtrak for Amtrak to use the line between Belen and Lamy for the Southwest Chief.¹⁰⁷ One of the standards of performance in that agreement specifically states that: "NMDOT and Amtrak shall cooperate in good faith in providing passenger rail services which will contribute to the success of Amtrak's Intercity Rail Passenger Service and New Mexico Rail Runner Express Service".¹⁰⁸ While this agreement requires Amtrak to pay the NMDOT for maintaining the line for intercity passenger service, it also intertwines rights and responsibilities of both parties until at least 2021.¹⁰⁹

Amtrak's relations with states that own railroads and that provide it with financial support to run trains on their behalf are also pursuant to binding agreements¹¹⁰ that as consideration for a state's financial support commit Amtrak to operate rail passenger service. Although the parameters of negotiations between New Mexico and Amtrak are unknown at this time, the important thing is that the state need not commit itself to any financial support unless and until

¹⁰⁶See *Hutcheson*, 1940-NMSC-001, ¶ 37 (expressing that if the "dominating motive" of an expenditure is a "strictly public use", then the expenditure is legal although a private use may incidentally benefit).

¹⁰⁷Agreement Between New Mexico Department of Transportation (NMDOT) and National Railroad Passenger Corporation (AMTRAK) (March 10, 2006).

¹⁰⁸*Id.* § 3.3(E).

¹⁰⁹*Id.* § 8.8.

¹¹⁰See, e.g., Agreement for the Provision of Rail Passenger Service Between the National Railroad Passenger Corporation And the State of Oklahoma For Service Between Oklahoma City, Oklahoma, and Fort Worth, Texas (October 1, 2013 through September 30, 2014).

the terms of an agreement are negotiated in a manner that protects its participation. By way of example, the state-Amtrak agreements mentioned above, although different in context than the proposed support for the Southwest Chief, give those states control over their participation in the agreements, such as: one-year term; right to terminate; detailed method of determining costs; detailed description of services; recognition of a state's budgetary limitations; required concurrence of the state in service changes; state's right to propose changes to scheduling, marketing and operations; state held harmless for operational liability; state's right to inspect and audit; documents subject to public inspection; and arbitration for disputes.

In ending this discussion regarding the Anti-Donation Clause, and in light of the earlier discussion regarding the status of Amtrak, there are three conclusions to be reached about state support for the Southwest Chief. The first is that the Anti-Donation Clause separately states a prohibition against a donation to private enterprise for the construction of a railroad, but Amtrak is not private enterprise and that prohibition therefore does not apply. Second, the provision of rail passenger transportation is an essential governmental function and thus an agreement with Amtrak to provide that transportation is not a gift to Amtrak and does not come within the underlying intent of the Anti-Donation Clause to prevent the state from being saddled with the debt and obligations of private enterprise. Third, building upon the second, the state will receive tangible consideration for its support in the continued provision of passenger rail service in northern New Mexico, as an Amtrak obligation, subject to a negotiated agreement. Thus, New Mexico's potential support is not a "gratuitous transfer" as the court defined "donation" in *Hosdreg* and therefore is not violative of the Anti-Donation Clause.

Exceptions

Previously, references to both "external" and "internal" exceptions to the Anti-Donation Clause were noted. Looking outside of the clause to the state constitution as a whole, no specific exception to the clause is found nor have the courts identified any provision that otherwise might be considered an exception to the clause's prohibitions. To be sure, other provisions of the constitution have been raised before the courts as prohibiting the same activity as has been

claimed to violate the Anti-Donation Clause, but they are additional limitations addressing different situations and are not exceptions.¹¹¹

Internally, within the Anti-Donation Clause, there are six separate exceptions, only one of which, Subsection D, may have any bearing on Amtrak's proposal.¹¹² Subsection D allows the state, counties or municipalities to create new jobs by providing land, buildings or infrastructure to support new or expanding businesses pursuant to implementing legislation, the Local Economic Development Act and the Statewide Economic Development Finance Act,¹¹³ and specific project approval. A review of the exception and current implementing legislation indicates that the intent of the exception is to provide financing of physical projects, that at the state level have been vetted by both the Economic Development Department and the New Mexico Finance Authority and that will have a revenue stream to pay back the state's money, such as with revenue bonds or leases. This intent does not appear to address practicably the Amtrak proposal because there is no project or other dedicated source of revenue to pay off bonds or a loan. Also, it should be noted that Subsection D is aimed at creating new job opportunities by supporting new or expanding businesses. Here, with Amtrak, the objective is to preserve an element of the state's transportation system. Thus, as written and implemented, the exception in Subsection D does not address an agreement with Amtrak to maintain the Southwest Chief through northern New Mexico.

¹¹¹See e.g., N.M. Const. art. IV, § 31 (limiting appropriations for charitable, educational or other benevolent purposes to only entities under the absolute control of the state) and see *Harrington v. Atteberry*, 1915-NMSC-058, ¶ 66, 21. N.M. 50, 153 P. 1041 (the author of the opinion found the appropriation for county fair prizes to violate art. 9, § 14, but the dissent (and majority of the court) found that it violated art. 4, § 31; the result was the same).

¹¹²Subsections A, B, C, E and F together, and G of art. 9, § 14 involve donations to sick and indigent persons, scholarships for Vietnam War veterans, educational loans to students of the healing arts, donations for affordable housing and scholarships for certain military war veterans for service after 1990.

¹¹³NMSA 1978, §§ 5-10-1 through 13 and NMSA 1978, chp. 6, art. 25, respectively.

Options

Having explored the language and intent of the Anti-Donation Clause and provided an interpretation that may reasonably support the state procuring essential transportation services from Amtrak without violating the Anti-Donation Clause, the discussion so far also informs as to how the Anti-Donation Clause might be amended to achieve the same result if that is the choice of the legislature. In addition, whether the decision is to amend the clause or not, enabling legislation is necessary to set the standards for how the parties will come to an accord.

It must be noted that an amendment to the Anti-Donation Clause — a constitutional amendment — even if adopted, may be untimely. Recall that Amtrak has announced that BNSF will no longer maintain the track that Amtrak uses to passenger service standards as of January 1, 2016. Assuming a resolution is adopted in the 2015 regular session to amend the clause, the question would not appear on the ballot until the next regular or general election in November 2016, unless a special election was called, and even then the question would not appear until at least mid-September 2015.¹¹⁴ Assuming again a favorable vote, enabling legislation would need to be adopted and, ultimately, a negotiation process would be required to come to an agreement with Amtrak and perhaps the other parties involved. This would probably push a final action by the state well into 2016 at the earliest and more likely into 2017.

An amendment to the Anti-Donation Clause to address the Amtrak proposal could be accomplished by amending the language of the current exception at Subsection D of the clause. But based on the earlier discussion of that subsection, it would surely complicate that provision by grafting onto it an intent and concept that is very much different than currently stated. If a constitutional amendment is going to be proposed to add an exception to the clause, it should stand on its own and be clear about what it permits. Such an amendment, by example, would first strike what has been referred to as the "railroad phrase" — "*. . . or in aid of any private enterprise for the construction of any railroad . . .*" — to prevent any ambiguity with new, amending language, and then add a new subsection that would: 1) express that providing transportation is an essential governmental function; 2) authorize the legislature to appropriate

¹¹⁴Constitution of New Mexico, Article 19, Section 1.

money in future enactments for transportation systems not developed by the state; 3) identify the entities eligible to receive transportation appropriations; 4) require legislative approval of each incident of support to a transportation system not developed by the state; 5) set basic contracting requirements; and 6) require enabling legislation.

If a decision is made to proceed without amending the Anti-Donation Clause, the above points would also be appropriate as a guide for legislation in the 2015 regular session to authorize the NMDOT to enter into an agreement with Amtrak to preserve the current route of the Southwest Chief and to appropriate the money to fund that agreement. Or, as an alternative for legislation in the upcoming session, it is interesting to compare the above proposed language with the Public Mass Transportation Act that was enacted in 1975 and last amended in 2003. It is set out below in full and essentially permits for mass transportation everything that has been discussed here for intercity passenger rail:

67-3-67. Name.

This act [67-3-67 to 67-3-70 NMSA 1978] may be cited as the "Public Mass Transportation Act".

67-3-68. Purpose and interpretation.

It is the intent of the legislature to assign to the state highway and transportation department all functions and powers necessary to develop a coordinated program with the United States government, and others, in the field of public mass transportation. In order to accomplish this purpose and obtain all possible funds available to implement this program, the Public Mass Transportation Act shall be liberally construed.

67-3-69. Power to state highway and transportation department.

In addition to the power and authority elsewhere granted to the state highway and transportation department to enter into cooperative agreements, the department is authorized to enter into agreements with any bureau, department or agency of the United States government dealing with or concerning the planning, design, construction, maintenance or supervision of any public mass transportation program or system, or the operation thereof, in this state. The department may additionally enter into agreements with any other bureau, agency or department of this state; any city, county school district or other political entity of this state; or any individual, firm, partnership, corporation, association or other organization, to carry out the foregoing.

67-3-70. Use of appropriated funds.

The department may expend such portion of its appropriated funds as it deems necessary to effectuate the purposes of the Public Mass Transportation Act.

It is possible that the implied understanding at the time was that any agreement the NMDOT entered into to expend its appropriated funds would provide consideration back to the state in the form of a legislatively mandated mass transportation program or system; the Anti-Donation Clause would not be implicated. This is the same concept and rationale discussed above under the heading Consideration. There does not appear to be any significant difference between what is authorized in the Public Mass Transportation Act and the Amtrak proposal. Indeed, there is no definition in the act for "public mass transportation program or system"; an option to address Amtrak's proposal would be to add a definition that includes long distance intercity rail¹¹⁵ or, better yet, rescript the language of that act into a new statutory provision geared to long distance intercity passenger rail. One important addition to this language would be a requirement that any agreement is subject to legislative approval.

Party Relationship

The following discussion about types of agreements is subject to the negotiation process with the other states and Amtrak. If New Mexico decides to move forward to procure the continued operation of the Southwest Chief in northern New Mexico from Amtrak, it will likely need to coordinate that procurement with Colorado and Kansas. It should not be necessary to have a contractual relationship with BNSF because its involvement as the right-of-way owner is its relationship with Amtrak, not with the states. That is, if the states procure the rail passenger service, it will be Amtrak's responsibility to enter into an operating agreement with BNSF for line service upgrades to match the Southwest Chief's needs.

¹¹⁵Generally, long distance intercity passenger rail is not considered mass transportation, mass transit or commuter rail; a cursory look online reflects this understanding. *See e.g.*, <http://www.infoplease.com/encyclopedia/science/mass-transit-types-advantages.html>. The Public Mass Transportation Act was relied upon in part by the Department of Transportation for its purchase of BNSF rail line. *See Memorandum, Rail Line Purchase*, from Rhonda Faught, secretary, New Mexico Department of Transportation, to Gene Moser, principal analyst, LFC (December 8, 2005).

Each state could probably enter into a separate agreement with Amtrak for its share of the cost, subject to some sort of escrow arrangement where money would not be released until each state has committed its share, although, as noted in the Background section, communities in Kansas and Colorado are moving forward to support Amtrak without any commitment from or formal coordination with New Mexico. If it is determined to have a mechanism for a joint or cooperative procurement, there are two, perhaps three, possibilities available: an interstate compact, a statutorily authorized cooperative procurement or a joint powers agreement.

Interstate compacts¹¹⁶ authorize a combination of states to achieve a common purpose. However, the primary uses are to resolve boundary disputes, manage the interstate allocation of resources and establish uniform guidelines and standards.¹¹⁷ Cooperative procurement for services is not usually the subject of compacts. Moreover, an interstate compact can take two to three years or longer to put in place.¹¹⁸ Some interstate compacts require congressional approval, but only those that alter the balance of political power between the state and federal government or those that intrude on a power reserved to Congress.¹¹⁹ Neither of these situations would apply to a cooperative procurement.

A better and perhaps speedier approach would be a statutorily authorized cooperative or joint procurement of services process. Each of the three states has a law that allows it to enter into a cooperative purchasing agreement for services with other states.¹²⁰ In New Mexico, procurement of services is usually conducted through a competitive process, but while its cooperative procurement provision is silent on this point, it is clear that this would be a sole-

¹¹⁶U.S. Const. art. 1, § 10, cl. 3.

¹¹⁷Crady deGolian, *Interstate Compacts: Background & History*, Council of State Governments (March 18, 2011), available at <http://knowledgecenter.csg.org/kc/content/interstate-compacts-background-and-history>.

¹¹⁸Nathan Dickerson, *Best Practices for Compact Development*, Council of State Governments (June 2, 2011), available at <http://knowledgecenter.csg.org/kc/content/best-practices-compact-development>.

¹¹⁹*Virginia v. Tennessee*, 148 U.S. 503, 518 (1893).

¹²⁰Colo. Rev. Stat. § 24-110-201 (2013); Kan. Stat. Ann. § 75-3739 (I) (2013); N.M. Stat. Ann. § 13-1-135 (2012).

source procurement,¹²¹ since Amtrak is the only provider of the wanted service. The New Mexico provision also provides that in cases where public money may be held before being disbursed and conditions and terms other than simple procurement are involved, the cooperative procurement must be pursuant to New Mexico's Joint Powers Agreements Act¹²² and that act appears to be a good fit for this situation. The act allows the state or its agencies, such as the NMDOT, to agree with other states and their agencies and instrumentalities and with federal agencies and instrumentalities, as Amtrak has been found to be by the United States Supreme Court, to exercise a common power, such as the provision of passenger rail travel, subject to specific legislative authorization for the agreement, approval by the secretary of finance and administration and strict accountability of receipts and disbursements.

Summary

This memorandum has addressed the matter of New Mexico entering into an agreement with Colorado, Kansas and Amtrak to keep the Southwest Chief train running on its historical route through northern New Mexico. It has explained the background facts leading to Amtrak's proposal for financial support, revealed Amtrak's unique status as a federal instrumentality, explored the Anti-Donation Clause and its relationship to Amtrak and Amtrak's proposal, provided an argument that entering into an agreement with Amtrak need not violate the clause but also provided an option to amend the clause if that is desired, identified possible enabling legislation and recommended an appropriate agreement mechanism to realize the continuation of the Southwest Chief on its traditional route through northern New Mexico.

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¹²¹NMSA 1978, § 13-1-126.

¹²²NMSA 1978, §§ 11-1-1 through 11-1-7.